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NO. 86-6169

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

WILLIAM WAYNE THOMPSON
Petitioner,

v.
STATE OF OKLAHOMA
Respondent.

On Writ Of Certiorari To The
Oklahoma Court Of Criminal Appeals

BRIEF OF AMICI CURIAE FOR RESPONDENT OKLAHOMA
BY KENTUCKY AND ALABAMA, ARIZONA, CONNECTICUT,
DELAWARE, FLORIDA, IDAHO, KANSAS, MISSISSIPPI,
MISSOURI, MONTANA, NEVADA, NEW MEXICO, NORTH
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INTERESTS OF AMICI CURIAE
IN SUPPORT OF THE RESPONDENT.
STATE OF OKLAHOMA

The amici curiae represented here are states having an interest in the issue of whether or not the Eighth Amendment limits punishment on the basis of age. The amici submit this brief in support of the respondent, State of Oklahoma, through their Attorneys General or Chief State Attorneys pursuant to United States Supreme Court Rule 36.4.

SUMMARY OF ARGUMENT

The per se rule urged by the petitioner is arbitrary and he does not cite any state or federal court decision expressly accepting his position. Eligibility for capital punishment should continue to be determined on an individualized, case-by-case basis. The states must be allowed to punish capital offenders consistently, according to the defendants' relative degree of culpability rather than simply by their birthdate. Maturity and sophistication are factors which vary from

individual to individual, and sentencers should be afforded an opportunity to consider these differences in determining the appropriate punishment for the crime. This Court has recognized that the determination of whether, and under what circumstances, a particular criminal penalty may be imposed is a matter of legislative policy deserving of judicial deference. The petitioner's "bright-line" approach would only result in inconsistency by ignoring individual differences, and therefore is wholly unreasonable. The rule he urges would also establish precedent for exempting other age groups undeservedly, even in non-capital contexts.

ARGUMENT

THE EIGHTH AMENDMENT DOES NOT PROHIBIT CAPITAL PUNISHMENT ON THE BASIS OF CHRONOLOGICAL AGE ALONE.

- A. Eligibility For Capital Punishment Should Continue To Be Determined On An Individualized, Case-By-Case Basis.

The Oklahoma Court of Criminal Appeals correctly held that the Eighth Amendment does not

prohibit capital punishment on the basis of age alone. Thompson v. State, Okl. Crim. App., 724 P.2d 780 (1986). A capital offender's chronological age is but one of the various circumstances the legislatures and courts should take into account. It is not the only relevant consideration, nor is it always the most important. Maturity and sophistication are factors which vary from individual to individual.^{1/} This is true of juveniles and adults alike.

1/. "Minors who become embroiled with the law range from the very young up to those on the brink of majority. Some of the older minors become fully 'street wise', hardened criminals, deserving no greater consideration than that properly accorded all persons suspected of crime. Other minors are more of a child than an adult. As the Court indicated in In re Gault, 387 U.S. 1 (1967), the facts relevant to the care to be exercised in a particular case vary widely. They include the minor's age, actual maturity, family environment, education, emotional and mental stability, and, of course, any prior record he might have." Fare v. Michael C., 442 U.S. 707, 734, n.4 (1979) (Powell, J., dissenting).

Guided, individualized consideration of the offender's character and the circumstances of his crime is the touchstone of capital sentencing. See Zant v. Stephens, 462 U.S. 862, 879 (1983), collecting cases. Gregg v. Georgia, 428 U.S. 153 (1976) and its progeny are intended to avoid the kind of "rigid", "mechanical" and "wholly arbitrary" determination urged here by the petitioner. Barclay v. Florida, 463 U.S. 939, 950 (1983). No particular circumstance of a capital offender's crime should automatically require the death penalty. Woodson v. North Carolina, 428 U.S. 280 (1976), or automatically foreclose it. Tison v. Arizona, ___ U.S. ___, 107 S.Ct. 1676 (1987). Rather, the sentencer must be "free to consider a myriad of factors to determine whether death is the appropriate punishment." California v. Ramos, 463 U.S. 992, 1008 (1983). Youthfulness is only one such factor.

B. The Case-By-Case Rule Urged Here Is Supported Overwhelmingly By State and Federal Court Decisions Expressly Dealing With The Issue. It Also Gives Appropriate Deference To The Legislature.

The petitioner cites to no state or federal court decision agreeing with his contention that the judiciary, rather than the legislature, should set an age limit for eligibility as a capital offender. To the contrary, it appears that every reported opinion deciding this issue has deferred to the legislature. The Fifth and Eleventh Circuits have expressly held that executing a killer who at the time of his crime was under eighteen years of age is not cruel and unusual punishment per se. "Nothing in society's standards of decency compel more than consideration of an eighteen^{2/} year old's youth as a mitigating factor." High v. Kemp, 819 F.2d 988, 993 (11th

^{2/}. High and Prejean were seventeen-years-old when they committed these crimes.

Cir. 1987), quoting Prejean v. Blackburn, 743 F.2d 1091, 1098 (5th Cir. 1984). See also Roach v. Martin, 757 F.2d 1463, 1483 (4th Cir. 1985), holding that the death sentence for a seventeen-year-old offender was not disproportionate in view of all the circumstances.

A growing number of state courts likewise have expressly held that the Eighth Amendment does not exempt youthful offenders from capital punishment. See, e.g., Ice v. Commonwealth, Ky., 667 S.W.2d 671 (1984) (fifteen-year-old offender); Trimble v. State, Md., 478 A.2d 1143 (1984) (seventeen-year-old offender); State v. Battle, Mo., 661 S.W.2d 487 (1983) (eighteen-year-old offender); Tokman v. State, Miss., 435 So.2d 664 (1983) (seventeen-year-old offender); Eddings v. State, Okla. Crim. App., 616 P.2d 1159 (1980) reversed other ground 455 U.S. 104 (1982) (sixteen-year-old offender); State v. Harris, 48 Ohio St.2d 351, 359 N.E.2d 67 (1976), vacated other ground 438 U.S. 351 (1978)

(seventeen-year-old offender); Magill v. State, Fla., 428 So.2d 649, 654 (1983) (Boyd, J., concurring and dissenting), appeal after remand, 457 So.2d 1367 (1984), vacated other grounds, Magill v. Dugger, ___F.2d___, No. 85-3820, Slip Opinion (decided July 28, 1987) (seventeen-year-old offender); State v. Valencia, 132 Ariz. 248, 645 P.2d 239, 241 (1982) (sixteen-year-old offender); Thompson v. State, Ind., 492 N.E.2d 264, 269 (1986) (seventeen-year-old offender).

The foregoing state and federal rulings are firmly supported by prior decisions of this Court defining the judiciary's "limited role" in analyzing an Eighth Amendment claim. Gregg v. Georgia, supra at 175.

The deference we owe to the decisions of the state legislature under our federal system [citation omitted] is enhanced where the specification of punishments is concerned, for "these are peculiarly questions of legislative policy." [citations omitted]. Id. at 177.

Therefore, in assessing a punishment selected by a democratically elected legislature against the constitutional measure, we presume its validity. We may not require the legislature to select the least severe penalty possible so long as the penalty selected is not cruelly inhumane or disproportionate to the crime involved. And a heavy burden rests on those who would attack the judgment of the representatives of the people. Id. at 176.

C. Most Death Penalty States Permit Capital Punishment Of Youthful Offenders.

The briefs on behalf of the petitioner try hard to set Oklahoma apart from other states in its treatment of chronological youthful offenders charged with capital crimes.^{3/}

^{3/}. "The Eighth Amendment is not violated every time a State reaches a conclusion different from a majority of its sisters over how best to administer its criminal laws." Tennessee v. Garner, 471 U.S. 1, 28 (1984) (O'Conner, J., dissenting); Spaziano v. Florida, 468 U.S. 447, 464 (1984).

Actually, of the thirty-six death penalty states^{4/}, Oklahoma is among the twenty-five which authorize capital punishment for youthful offenders.^{5/} Thus, Oklahoma belongs to a seventy percent majority of death penalty jurisdictions which look beyond the offender's birthdate in determining the appropriate form of punishment to be imposed for a capital crime. More than a third of this number set no statutory

4/. Alabama, Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Idaho, Indiana, Illinois, Kentucky, Louisiana, Maryland, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, and Wyoming. (Petitioner's Appendix B).

5/. Alabama, Arizona, Arkansas, Delaware, Florida, Georgia, Idaho, Indiana, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nevada, New Hampshire, North Carolina, Oklahoma, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Virginia, Washington, and Wyoming. Id.

age limit whatsoever.^{6/} The petitioner's Appendix D shows that thirty-six offenders under the age of eighteen years were sentenced to death in sixteen different states between 1982 and 1987. Sentencers in all states, however, are required to consider the offender's chronological age and a variety of other mitigating factors in a capital prosecution.

Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, supra; Skipper v. South Carolina, 476 U.S.____, 106 S.Ct. 1669 (1986).

D. The Petitioner's Statistics Do Not Support His Position.

The petitioner further contends that judges and juries are increasingly reluctant to execute youthful offenders. He arrives at this conclusion by comparing the number of juvenile death sentences with the number of juvenile

6/. Arizona, Delaware, Florida, Oklahoma, Pennsylvania, South Carolina, South Dakota, Washington, and Wyoming. Id.

arrests for non-negligent homicide. (Petitioner's Appendix G). His statistics do not reflect how many of these arrests were for aggravated murders punishable by death, or how many of the arrestees avoided prosecution as adult offenders, or how many of them successfully plea-bargained for a lesser degree of homicide, or how many of them otherwise avoided prosecution altogether, or how many of them never faced death as a possible punishment because they were either arrested in a non-death penalty state or tried without the prosecutor requesting death as a possible punishment. Owing to these omissions, the petitioner's statistical conclusions are completely unreliable. His Appendix C, in fact, shows that the total number of executions conducted during the 1980's included a higher percentage of juvenile offenders than any other period during this century. If there is a

trend, it is towards execution^{7/} of youthful offenders, not away from this.^{8/}

7/. Logically, the death penalty has a greater deterrent effect than does life imprisonment. Statistically, the death penalty has a profound effect on the number of murders committed in this country. Capital Punishment: An Idea Whose Time Has Come Again, The Lincoln Institute For Research And Education (Washington, D.C. 1986), p.12. The petitioner's contention that the death penalty would provide an incentive for "death-defying" youths to commit capital crimes is an exercise in circular reasoning.

8/. The petitioner and his supporters argue in this Court that capital punishment of youthful offenders is a relic of a bygone era. It is interesting to note that elsewhere, opponents of capital punishment have expressed a fear that precisely the opposite is true: "That more minors will be sentenced to death also is indicated by the growing willingness, at least on the part of some, to impose this sentence on minors. More and more states are amending their death penalty statutes to permit the imposition of death sentences on offenders under age eighteen. That [38] juvenile offenders are currently on death row certainly demonstrates that sentencers are willing to impose the penalty. All of these factors, along with the increasingly common imposition of death sentences in general, strongly suggest that more minors will receive capital sentences in the years ahead, unless there is judicial recognition that the death penalty is unconstitutional when imposed on these very young offenders." Capital Punishment For Minors: An Eighth Amendment Analysis, Vol. 74, The Journal of Criminal Law and Criminology, No. 4 p. 1471, 1485 (1983).

Complaint is made that some youthful offenders are eligible for capital punishment even though they suffer -- or enjoy as the case may be -- legal disabilities preventing them from voting, owning property, being drafted, contracting, drinking, and serving on a jury. Amici discern no inconsistency here. It is as a matter of convenience and economy that privileges and disabilities are conferred upon youths, to protect them as well as the adults with whom they interact. The government could not very well be expected to conduct a trial-type hearing, complete with the opportunity for exhaustive appellate review, every time a twelve-year-old thought he was mature enough to begin voting or driving a car. The presumption of immaturity in those situations is, of necessity, conclusive. That presumption must give way, however, in instances where the government endeavors to enforce its laws by punishing criminal offenders on a case-by-case

basis. There the presumption yields to convincing evidence that the accused, having engaged in proscribed activity, and being possessed of adult characteristics, deserves punishment as an adult offender.

E. The States Must Be Allowed To Punish Capital Offenders Consistently, According To Their Relative Degrees Of Culpability Rather Than Simply By Their Birthdates.

The case-by-case analysis urged here is fair to all concerned. It does not require, as the petitioner's "bright-line" approach would do, that capital offenders otherwise factually and legally indistinguishable be eligible for vastly different punishment simply by reason of their birthdates. As the Court recently observed in Buchanan v. Kentucky, ___U.S.___, 107 S.Ct. 2909, 2915 (1987), the states have a compelling interest in promoting consistent results, which in turn foster public confidence in the criminal justice system. "[C]apital punishment [must] be imposed fairly, and with reasonable consistency.

or not at all." Eddings v. Oklahoma, supra at 112, citing Lockett v. Ohio, 438 U.S. 586 (1978). "[T]he rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency." Eddings, supra at 112.

Surely the Constitution allows states to consider factors other than chronological age in determining whether an offender is a youth or an adult. In Eddings, supra at 116 the Court noted that "youth is more than a chronological fact." None of the studies relied upon by the petitioner claim that youthful offenders invariably are less mature or sophisticated than adults. While it has been suggested that youthful offenders generally behave more impulsively than adults, there are many exceptions to the rule. Sentencers should be permitted an opportunity to evaluate whether or not the defendant before them has, in fact, behaved impulsively or whether the youth has acted with adult deliberation.

We are not unaware of the extent to which minors engage increasingly in violent crime. [footnote omitted] Nor do we suggest an absence of legal responsibility where crime is committed by a minor. Eddings, supra at 116.

Many of the capital crimes committed by youthful offenders demonstrate the same degree of cruelty and premeditation seen in capital cases involving adult offenders. See, e.g., State v. Battle, supra (eighteen-year-old defendant brutally beat, robbed, raped and murdered an eighty-year-old woman, leaving her to die with a knife protruding from her eye); Trimble v. State, supra (seventeen-year-old defendant kidnapped, raped, assaulted and murdered his victim, beating her head and body with a baseball bat, and cutting her throat from "ear to ear" to ensure her death); Burger v. Kemp, ___ U.S. ___, 107 S.Ct. 3114 (1987) (seventeen-year-old petitioner, a U.S. Army Private, participated in the kidnapping, robbery, oral sodomy and anal sodomy of a taxi driver whom he murdered

by locking him inside the trunk of the cab and submerging it in a pond); Stanford v. Commonwealth, Ky., ___ S.W.2d ___, Nos. 83-SC-65-MR & 83-SC-66-MR, Slip Opinion (decided April 30, 1987) (seventeen-year-old defendant^{9/} participated in the robbery, kidnapping, rape, oral sodomy, anal sodomy and execution-style murder of a gas station attendant, after which he laughed and boasted to others while awaiting trial). The foregoing are not mere youthful pranks, but are a few examples of the uniquely violent, premeditated crimes being committed by youthful criminals. The singular cruelty inflicted by such individuals cannot reasonably be ascribed to mere "impulse", as the briefs on behalf of the petitioner would prefer to do. Instead, crimes such as these manifest the maturity and sophistication of an adult mind.

^{9/}. His sixteen-year-old codefendant was David Buchanan. See Buchanan v. Kentucky, supra.

despite the offender's chronological age.^{10/} States should not be required to punish youthful and adult murderers differently when there exists no rational basis for doing so. States recognize the special mitigation of youth and give sentencers the opportunity to evaluate that factor in sentencing youthful killers. It is quite enough that in most states, trial judges indulge a rebuttable presumption of

10/. Upholding the death sentence of a seventeen-year-old offender in Trimble v. State, supra at 1163, the Court said: "Trimble's crime was not a youthful prank; it was a cold brutal act of repeated and sadistic violence." The Maryland Supreme Court's opinion contains an excellent discussion of the issue presented in this case. There it was noted that, "[S]eventeen-year-old youths can be deterred from committing brutal rape-murders so the legislature's judgment in that regard is not a purposeless act." Id. at 1164. The Court concluded that, "[A] case by case approach not only affords the individualized consideration warranted in death-penalty cases, but it also avoids the arbitrary line-drawing that is endemic to any hard-and-fast distinction between juveniles and non-juveniles." Id. at 1164.

chronological immaturity, prosecutors bear the burden of disproving immaturity, juries consider youthfulness in determining punishment as well as guilt, and appellate courts examine youthfulness when assessing the appropriateness of the sentence.

F. The Petitioner's Per Se Rule Would Establish Precedent For Undeserved Exemptions Of Other Age Groups, Even In Non-Capital Contexts.

To adopt the per se or "bright line" rule urged here by the petitioner and his supporters would only invite further claims that other age groups must be exempted from capital punishment, e.g., minors, "young adults", ^{11/} the elderly, ^{12/} and that juveniles must be

^{11/}. The amicus brief filed in this case by the National Legal Aid and Defender Association urges that, "[A]dolescents should be spared from the death penalty, at least until they reach age 18." (p. 21, emphasis added). Page 19, note 21 of the same brief advises that, "Adolescence lasts roughly from age 12 to 19." (emphasis added).

^{12/}. The amicus brief filed in this case by Amnesty International suggests an age "limit of 70 years." (page 31).

exempted from life imprisonment if they may be criminally punished at all.^{13/} As was observed in McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1779-1781 (1987), the consequences of such a holding should be considered by this Court. There the Court noted the endless ramifications that a claim such as McCleskey's would generate if accepted.

The petitioner and his supporters would not hesitate to conclude that an adult having the mental and emotional maturity of a six-year-old child should be spared from capital punishment. They are willing to consider individual differences in that kind of situation, yet would refuse to do so where a fully mature seventeen-year-old offender is concerned. Amici consider such a position untenable and totally devoid of logic.

^{13/}. Capital Punishment For Minors: An Eighth Amendment Analysis, supra at 1492, ventures that a State may never impose its maximum penalty upon youthful offenders for even non-capital crimes.

CONCLUSION

WHEREFORE, Amici respectfully urge the Court to affirm the judgment below.

Respectfully submitted,

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